No. 145.
Brief of Forbis for D. C. (Mo.)
Filed Sept. 27, 1897.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 145.

WILLIAM A. CLARK, PLAINTIFF IN ERROR,

vs.

WILLIAM F. FITZGERALD, MEYER GENZBERGER, JAMES W. FORBIS AND WILLIAM P. FORBIS

MOTION OF DEFENDANTS IN ERROR TO DISMISS WRIT OF ERROR, WITH NOTICE THEREOF, AND BRIEF ON MOTION.

In the Supreme Court of the United States. October Term, 1897.

No. 145.

WILLIAM A. CLARK, Plaintiff in Error,
vs.
WILLIAM F. FITZGERALD, MEYER Gensberger, James W. Forbis and William P. Forbis, Defendants in Error.

To the above named Plaintiff, and to his Attorneys, Robert B. Smith and Robert L. Word:

You will please take notice that defendants in error will on Monday, the 11th day of October, 1897, at the convening of the Court, or so soon thereafter as application can be made and heard, move the Supreme Court of the United States to dismiss the writ of error issued in the above entitled cause and matter, and to remand said cause to the Supreme Court of Montana, and to affirm the judgment of the Supreme Court of Montana.

A copy of the motion, embodying the grounds upon which the same is made, together with a copy of the argument and brief of the defendants in error, is herewith served upon you.

This September 4th, 1897.

JAMES W. FORBIS,
In Person, and Attorney for Other Defendants in Error.

Accept service of foregoing notice, with copy of motion and of argument and brief of defendants in error, this 10th day of September, 1897.

ROBERT B. SMITH,
ROBERT L. WORD,
Of Helena, Montana, Attorneys and Solicitors for Plaintiff in Error.

In the Supreme Court of the United States. October Term, 1897.

No. 145

WILLIAM A. CLARK, Plaintiff in Error,
vs.
WILLIAM F. FITZGERALD, MEYER Gensberger, James W. Forbis and William P. Forbis, Defendants in Error.

Now come the above named Defendants in Error, and move the Court to dismiss the Writ of Error, issued in the above entitled cause and matter, and to remand said cause to the Supreme Court of the State of Montana, and also to affirm the judgment of the Supreme Court of the State of Montana, upon the following grounds, namely:

First. That it appears from the record that this Court has no jurisdiction of said cause, and that the Writ of Error was erroneously issued therein, for the reason that the record presents no question involving the construction of the Constitution of the United States, or of any Statute or Treaty of the United States, nor does the record present any question of law for the consideration of the Court.

Second. That it appears from the record that this Court has no jurisdiction of said cause, and that the Writ of Error was erroneously issued therein, for the reason that there is not in the said record any objection or bills of exception to any alleged erroneous rulings of the trial Court, and that all objections of the Plaintiff in Error to any rulings of the trial Court have been by him waived.

Third. That the Writ of Error was granted upon the ground that the judgment was not supported by the pleadings, whereas the pleadings fully sustain the judgment, and there is no error apparent in the record.

JAMES W. FORBIS,
In Person, and Attorney for Other Defendants in Error.

September 4th, 1897.

In the Supreme Court of the United States. October Term, 1897.

No. 145.

WILLIAM A. CLARK, Plaintiff in Error,
vs.
WILLIAM G. FITZGERALD, MEYER Gensberger, James W. Forbis and William P. Forbis, Defendants in Error.

STATEMENT.

The defendants in error sued the plaintiff in error for the value of certain ores extracted from a vein, alleged to have its apex in the Niagara Lode claim.

The answer of the plaintiff in error denies that the apex of the vein from which the ore was extracted was within the limits of the Niagara Lode claim, but alleges that the apex is within the lines of the Black Rock Lode claim, to which claim plaintiff in error is entitled.

As a further defense plaintiff in error also alleges that the veins in the two locations or claims unite on their downward course, and in consequence of the Black Rock claim being the older, that he was entitled to all ore below the junction.

Another defense set up in the answer is to the effect that the Niagara claim was not located along but across the vein in controversy, and that in consequence the side lines became end lines, and that no extra lateral rights attached to such vein by virtue of the Niagara location.

All of these matters were put in issue by the replication.

A trial by jnry was had which resulted in findings in favor of Plaintiffs—Defendants in Error—and are to the effect that the apex of the vein in controversy passes entirely within the Niagara boundaries at a point 513 feet westerly from the northeast corner of the Black Rock claim, and that the value of ore extracted from the vein in controversy was the sum of $40,863.81.

Upon the verdict and findings a judgment was rendered for the Plaintiffs below, adjudging Plaintiffs below to be entitled to the vein after the same passes into the Niagara lode claim, and awarding them damages in the sum of $27,242.54, being two-thirds of the value of the entire ore extracted by Plaintiff in Error from the vein in controversy.

The Plaintiff in Error moved for a new trial in the Court below, and embodied the evidence and certain exceptions in a statement on motion for new trial. The motion for new trial was overruled, and Plainttff in Error appealed to the Supreme Court of Montana from

the judgment and order overruling the motion for a new trial. The Supreme Court of the State affirmed the judgment of the lower Court; and a Writ of Error is sued out from this Court to review the proceedings of the State Supreme Court.

There is no bill of exceptions in the record. So far as the record shows no exceptions were taken except such as are embodied in the statement on motion for new trial, and these are not before this Court for examination. By stipulation of parties the printed record contains only the pleadings, verdict and judgment, of the record of the trial Court.

Upon this motion to dismiss the appeal, the question presented is: Is there anything in the record which can justify this Court in reviewing the trial Court and the Supreme Court of Montana?

ARGUMENT AND BRIEF.

The Plaintiff in Error is attempting to raise upon this Writ of Error the very vexed question, which has often been before this Court but remains undecided, to-wit: Do extra lateral rights attach to a vein when its apex passes through an end line and side line of the claim? The decision of this question is of great importance to the mining industry, and one which Defendants in Error submit should be presented upon a record, showing the facts in such clear and unmistakable manner as to give the Court a full and fair opportunity for its discussion and decision. Each and every one of the seven assignments of error is directed to this one question of law, and Plaintiff in Error does not contend that there is any error in the record, except rulings of the Court in giving extra lateral rights to a vein passing through an end and a side line. It is true that the Supreme Court of Montana has announced in this case the doctrine which Plaintiff insists is incorrect. But unless the record is in condition to be reviewed by this Court, we take it it will not undertake to review the State Supreme Court, although it might be evident that the State Supreme Court was in error.

The instructions given upon the trial were not excepted to, and the Supreme Court of Montana, having the whole record before it, refused to review the instructions for that reason. Proceeding however, the Supreme Court say: "We will concede to the Black Rock that this question is raised by the pleadings," etc., (p. 19.) And upon this assumption the cause was discussed and affirmed.

Eliminating the opinion of the Supreme Court, there is nothing in the printed record to show how the lower Court ruled upon any question. In fact there is nothing to indicate whether the ores in question were extracted from the Niagara or Black Rock claim. For

aught that appears the ores may have been extracted from within the lines of the Niagara claim, and from a vein having its apex in such claim.

With all respect to the Supreme Court of the State, we submit that the question discussed in its opinion, which it is sought to have this Court pass upon, is not presented in a reviewable shape by the pleadings. It is true that the issue was presented as one of fact, the defendant below alleging that the Niagara Lode claim was not located "along" but "across" the vein, thereby rendering the side lines end lines. But this is controverted by affirmative allegations in the complaint, and by denials in the replication. It is possibly true that this issue was tendered by the pleadings, but there is nothing in the record to show what view was taken of the question by the Court which tried the cause. Closing our eyes to all that portion of the record not printed, it could as conclusively be asserted that the Court ruled against the extra-lateral rights of the plaintiffs below as in favor of them. We have pleadings tendering an issue. and a judgment founded thereon. Furthermore, defendants in error sue to recover their proportion of ores extracted from the downward course or dip of a vein having its apex in the Niagara ground. They allege in their complaint (Record page 2) that plaintiff in error extracted and converted ores from such a vein "and still continue * * * * * to extract ore from said vein as aforesaid in its downward course or dip, both *within and without* the vertical side lines of the said Niagara Lode claim." The findings, verdict and judgment show that the ore in controversy was taken from the downward course or dip of a vein having its apex within the Niagara lines, but there is nothing in the record to show what portion of the ore was extracted *within* or what portion of the ore was extracted *without* the vertical side lines of the Niagara Lode. From aught that appears in the record, all of the ore may have been extracted from within the lines of the Niagara Lode. Whether the rulings of the Court were in favor of plaintiffs to the full extent of their contentions, or limited their right of recovery to ores extracted from within their own ground, we may not know upon this appeal. Had the judgment been against the plaintiffs below, they could with equally as good reason ask this Court to review the judgment, because the ruling might have been made against them.

In other words, plaintiff in error is asking this Court to assume, without any record to sustain the assumption, that the trial Court has ruled incorrectly upon issues presented, because under the issues raised the Court might have ruled to his detriment.

If plaintiff in error should insist that the judgment entered herein shows the ruling of the Court upon this question, we answer:

1st. There is nothing in the judgment to show upon what it is based. Had the Court instructed the jury against extra-lateral rights, the judgment would be the same as at present. There is nothing in the judgment more than in the pleadings, showing what view the Court took of the question.

2nd. Should the judgment be construed as a ruling upon the question, then we contend that there should have been an objection and exception to the entry of the judgment. For aught that appears there has been a complete acquiescence in the entry of the judgment, so far as any diversity of opinion is concerned as to the law of the case.

And this brings us to the question: Had not the plaintiff in error by his action in failing in every respect to object or except to the ruling of the Court, estopped himself from asking to have those questions reviewed by this Court? The Supreme Court of Montana, having the whole record before it, states in its opinion (page 19) "that no exceptions to these instructions were preserved or specified, so that they can be now reviewed," and then proceeds to discuss the case upon the ground that the question is raised by the pleadings, stating that the Court concedes that, without really determining such to be the case.

It is apparent from the whole record, that the plaintiff in error did not object to the ruling of this Court in determining that extra-lateral rights followed a vein passing through the end and side lines of a mining claim. The instructions to that effect were acquiesced in as correct principles of law, and no objections or exceptions were ever taken or recorded against the Court's rulings upon these matters. Not until this Court, in the case of King vs. Amy and Silversmith Mining Co., 152 U. S. 222, made its decision, which was after the trial of the case at bar, did the plaintiff in error attempt to avail himself of objections which he had failed to take, and which he had theretofore actually waived.

It seems useless to call the Court's attention to authorities, holding that objections and exceptions must be taken before the appellate courts can review errors complained of. The whole matter is so well stated, however, in the text of Volume 8 of the Encyclopedia of Pleading and Practice, page 157, that we feel constrained to quote it:

"As a general rule, objections which were not taken upon the trial or in the course of proceedings below cannot be urged upon appeal or error. This doctrine is founded upon considerations of

great importance to the administration of justice, and which are recognized to a greater or less extent in the practice of all the courts, The constant application which is made of this rule shows how well it serves the interests of the public as well as of litigants. It is certainly not unreasonable to require a party desiring to review, in an appellate court, the action of the trial court, to call the attention of the trial court, by seasonable objections, to the proceeding complained of."

Again, on page 163:

"An objection alone is not sufficient to preserve a question for review on appeal or error. To save the objection an exception is necessary. This rule is as well settled as that requiring an objection to be made when the action deemed to be erroneous is taken. In the absence of an exception, errors committed by the trial court will be considered waived."

We therefore respectfully submit that this writ of error should be dismissed, upon the ground that there is nothing in the record which can authorize this Court, as a Court of Review, to take jurisdiction of it. It does not appear what, if any, rulings, were made by the trial Court, nor is there a semblance of objection or exception to anything done by the trial Court, When parties to the record acquiesce in the rulings of a Court, they can never be heard to thereafter complain that in such matters the law has been misconstrued.

Respectfully submitted,

JAMES W. FORBIS,

In Person, and Attorney for Other Defendants in Error.